MEMORANDUM OPINION OF THE DISTRICT COURT

The liability of the defendant, National Surety Corporation, to the plaintiff, Frank W. Wicker, depends upon whether Commonwealth Ford, Incorporated, constructively delivered a reassigned certificate of title for a motor vehicle to Joseph F. White on or before December 24, 1961. If the certificate had been constructively delivered, White was the owner of the vehicle he was driving, and the defendant is not liable. If the certificate had not been constructively delivered, Commonwealth Ford was the owner of the vehicle, and the defendant is liable. The Court is of the opinion that Commonwealth Ford has not constructively delivered the certificate and consequently judgment must be entered for the plaintiff.

There is no serious dispute about the material facts. The Court will state its findings chronologically. National Surety Corporation issued Commonwealth Ford a liability policy which contained an omnibus clause extending coverage to persons using a vehicle owned by the insured with its permission. This policy was in effect at all times pertinent to this case. The limit of liability with respect to any one person injured in an accident was $100,000.00.

Commonwealth Ford, a motor vehicle dealer, acquired a station wagon from Lorraine O. Sharpe in October 1961. Pursuant to Section 46.1-90, Code of Virginia, 1950, Commonwealth Ford held the certificate of title, which Lorraine O. Sharpe had assigned to it, without securing a new certificate in its name.

The evidence is in conflict concerning the date upon which White transacted business with Commonwealth Ford. The Court finds that this occurred on December 20, 1961, when White selected for purchase at a price of $1,095.00 the station wagon formerly owned by Sharpe and then owned by Commonwealth Ford. White traded a truck owned by his

mother, paid $50.00 down and agreed to pay $50.00 on December 21, which he never paid. The balance of the purchase price was financed by a conditional sales contract.

White could not read. He signed a buyer's order, and a credit application. He signed in blank an application for title. His signature to this blank paper was acknowledged by a notary public who was an employee of Commonwealth Ford. He also signed in blank a conditional sales contract. He signed a registration card, which could be completed only by the Division of Motor Vehicles.

The purchase was financed by a conditional sales contract, which Commonwealth Ford sold to Motor Credit Corporation. This financing company's office entered by going through Commonwealth Ford's show room. Four of the five directors of Motor Credit Corporation were directors of Commonwealth Ford. On December 20 an official of Motor Credit Corporation approved the transaction.

That evening an employee of Commonwealth Ford prepared an application for a temporary registration certificate, which White executed. Commonwealth Ford issued him a temporary license plate for which White paid one dollar. White never paid the $10.00 permanent license fee. He took possession of the station wagon on December 20.

White was advised by an employee of Commonwealth Ford that the corporation would send the papers to the Division of Motor Vehicles, and that he could stop by the Corporation's office and pick up his registration card at a later date. This arrangement was agreeable to him.

On December 21, 1961, the conditional sales contract was completed and delivered to Motor Credit Corporation which immedately paid Commonwealth Ford the amount due it. Commonwealth Ford's method of billing and completing title papers permits the sale and delivery of condi-

tional sales contracts to Motor Credit Corporation before or after a certificate of title is reassigned.

The reassignment of the certificate of title to White was dated December 20, and a notary public who was an employee of Commonwealth Ford certified that it was signed on December 20. The reassignment was neither executed nor acknowledged on December 20 despite the fact that it bears these dates. There is some uncertainty among the employees of Commonwealth Ford whether they executed the reassignment of the certificate of title and acknowledged it on December 21 or on December 22. The Court finds that this was done on December 21.

Also on December 21 employees of Commonwealth Ford completed the other papers including White's application for a title certificate, which he had previously signed and acknowledged in blank. After the title papers were completed they were submitted to a supervisory employee of Commonwealth Ford for his inspection and approval. The evidence does not disclose when this was done. In the ordinary course of business the papers would have been sent to a sales manager on the morning of December 22.

Commonwealth Ford never physically delivered the reassigned title to White.

The Division of Motor Vehicles was closed for the Christmas holidays from Noon on December 22 until 8:30 A.M. on December 27.

On December 24, White, while operating the station wagon with the permission of Commonwealth Ford, struck and injured the plaintiff Wicker.

On December 27, about 11:56 A.M., the Division of Motor Vehicles received by messenger from Commonwealth Ford the reassigned title, the application for certificate of title, the temporary registration certificate for the temporary

license plate and the registration card. The Division's office is about one block from the place of business of Commonwealth Ford. The Division issued a new certificate of title showing White to be the owner of the station wagon, noting thereon the lien of Motor Credit Corporation. Pursuant to Section 46.1-74, Code of Virginia, 1950, the Division sent the certificate to the lien holder. The Division completed the registration card and sent it to Commonwealth Ford.

Approximately 80 per cent of the motor vehicle dealers in the vicinity of Richmond accumulate title papers and transmit them to the Division of Motor Vehicles once a week or more often. Dealers in Virginia transmit about 80 per cent of the title papers received by the Division.

White never made any payments on the station wagon. It was repossessed by Motor Credit Corporation and repurchased pursuant to agreement by Commonwealth Ford for the contract price less repairs.

Wicker recovered a judgment against White in the Law and Equity Court of the City of Richmond on May 16, 1962, in the amount of $150.000.00. Judgment against White was returned unsatisfied. Thereafter Wicker brought this suit against National Surety Corporation seeking recovery under the omnibus clause of the policy issued Commonwealth Ford.

Section 46.1-90, Code of Virginia, 1950, sets forth the duties of a motor vehicle dealer in transferring title. This section provides, in part, that the dealer "* * upon transferring his title or interest to another person shall give notice of the transfer to the Division and shall endorse and acknowledge an assignment and warranty of title upon the certificate and deliver it to the person to whom the transfer is made."

The cases interpreting the Virginia statutes concerning the transfer of ownership of motor vehicles hold without

exception that strict compliance with the statutes is necessary to effect the transfer. *United States* v. *One Hudson Hornet Sedan*, 110 F. Supp. 41 (W.D.Va. 1953); *United States Fidelity & Guaranty Corp.* v. *Myers Motors, Inc.*, 143 F. Supp. 96 (W.D.Va. 1956); *Thomas* v. *Mullins*, 153 Va. 383, 149 S.E. 494 (1929); *Sauls* v. *Thomas Andrews & Co.*, 163 Va. 407, 175 S.E. 760 (1934); *Nationwide Insurance Co.* v. *Storm*, 200 Va. 526, 106 S.E. 2d 588 (1959). See also *Eureka-Security Fire & Marine Ins. Co.* v. *Maxwell*, 276 F. 2d 132 (4th Cir. 1960); *Byrd* v. *American Guarantee & Liability Ins. Co.*, 180 F. 2d 246 (4th Cir. 1950).

The leading case is *Thomas* v. *Mullins*, 153 Va. 383, 149 S.E. 494, 497 (1929), where Mr. Justice Campbell said:

> "* * *. In order to complete the sale upon his part, it is essential that the seller conform to the statutory requirement by delivering to the buyer a proper assignment of title."

The statutes have been amended from time to time since *Thomas* v. *Mullins*, *supra*, but the requirements for transfer of ownership of a motor vehicle have remained substantially the same. Thus, in *Nationwide Insurance Co.* v. *Storm*, 200 Va. 526, 106 S.E. 2d 588, 589 (1959), the Court reiterated that the seller must deliver to the purchaser a proper assignment of title. Assignment and delivery are necessary whether the seller is an individual, *Nationwide Insurance Co.* v. *Storm*, *supra*; or a dealer, *United States Fidelity & Guaranty Corp* v. *Myers Motors, Inc.*, 143 Fed. Supp 96 (W.D.Va. 1956).

Although no case has been cited as authority, the Court is of the opinion that constructive delivery of the reassigned certificate of title transfers ownership of a motor vehicle. Actual physical delivery is not necessary.

Three elements are required to establish that constructive delivery has been made. First, the certificate of title must be reassigned before constructive delivery. Second, there must be an intention to make constructive delivery of the reassigned certificate. Compare *Payne* v. *Payne*, 128 Va. 33 104 S.E. 712, 716-718 (1920), which holds that intention to deliver is required to establish constructive delivery of a deed. Third, constructive delivery must be established by an act that will enable the state, the public, the seller and purchaser to ascertain definitely at any given time who is the owner of the motor vehicle. In *Thomas* v. *Mullins*, 153 Va. 383, 149 S.E. 494, 497 (1929), the Supreme Court of Appeals of Virginia emphasized the public's interest in establishing the ownership of motor vehicles. There, with reference to the statute requiring the seller to deliver to the buyer a properly assigned title, the Court said:

> "The statute is essentially a police regulation, enacted primarily for the protection of the public, and its provisions are mandatory in their terms."

The reason for requiring a definite act to establish constructive delivery is demonstrated by cases which show the importance of determining exactly when ownership of a motor vehicle is transferred so that rights may be ascertained with respect to the omnibus clause in insurance policies, *Byrd* v. *American Guarantee & Liability Ins. Co.*, 180 Fed. 2d 246 (4th Cir. 1950); *United States Fidelity & Guaranty Corp* v. *Myers Motors, Inc.*, 143 Fed. Supp. 96 (W.D.Va. 1956); *Nationwide Insurance Co.* v. *Storm*, 200 Va. 526, 106 S.E. 588 (1959); forfeiture proceedings, *United States* v. *One Hudson Hornet Sedan*, 110 Fed Supp. 41 (W.D.Va. 1953); and coverage of fire insurance policies, *Eureka-*

Security Fire & Marine Insurance Co. v. *Maxwell*, 276 Fed. 2d 132 (4th Cir. 1960).

When White took possession of the station wagon on December 20, Commonwealth Ford was still its owner. Delivery of possession of the vehicle, coupled with intention to transfer ownership, did not transfer ownership of the vehicle. *United States* v. *One Hudson Hornet Sedan*, 110 Fed. Supp. 41 (W.D.Va. 1953). On December 20 the title certificate had not been reassigned and consequently it could not be delivered actually or constructively.

After the certificate has been reassigned and the intention to make constructive delivery exists, there must be some act on the part of the seller to show that constructive delivery has been made. The provisions of the statutes pertaining to motor vehicles furnish guides to the acts which are necessary to determine that constructive delivery has been made and the time at which it was made. Section 46.1-90, Code of Virginia, 1950, provides, in part, that the dealer upon transferring his title "* * shall give notice of the transfer to the Division * * ." Section 46.1-123, Code of Virginia, 1950, requires an application for a temporary license plate to be forwarded by the dealer to the Division on the day of issuance. Compliance with these statutes or with either of them, together with other pertinent evidence, would show that constructive delivery of the certificate had been made and the time when it was made. In this case notice was given and the application was forwarded to the Division on December 27.

Sections 46.1-41, 51, 52, Code of Virginia, 1950, provide that the owner is to secure registration and certificate of title, the method of making application and the statements it must contain. The application form requires the answers to be supplied under oath. An application for a new certifi-

cate of title completed, executed and acknowledged after title had been reassigned would be competent evidence tending to show that the purchaser had accepted constructive delivery of the reassigned certificate. This, however, was not done in the instant case. Here, White signed the application in blank, and the notary dated his acknowledgment December 19. The certificate of title was not reassigned until December 21, so the date on the application for the new certificate furnishes no definite evidence of constructive delivery or of the time such delivery was made.

The fact that a conditional sale was involved in this transaction is not of controlling significance. The president of Commonwealth Ford testified that the business practices of Commonwealth Ford permitted the sale and delivery of contracts to Motor Credit Corporation either before or after the reassignments were made. In this case the defendant takes the position that the conditional sales contract was sold to Motor Credit Corporation on December 20 before the certificate was reassigned.

Therefore, sales or deliveries of conditional sales contracts to Motor Credit Corporation do not establish Commonwealth Ford's intent to deliver reassigned certificates of title. Moreover, the dates placed on the conditional sales contract and on the reassigned certificate of title, including the date of the notarial certificate, are not the dates these papers were actually executed. Consequently, the conditional sales contract, its sale or delivery furnishes no reliable, definite standard by which the state or the public can ascertain when constructive delivery of the reassigned certificate was made.

The motor vehicle statutes contain many references to conditional sales. While provision is made for the lien holder to hold the certificate of title showing his lien, Section 46.1-74, Code of Virginia, 1950, it is significant that no exception is made in the statutory requirements for transferring

ownership because a conditional sales contract is involved.

The defendant, however, argues that since the transaction with White involved a conditional sales contract, Commonwealth Ford was entitled to hold the papers until they were sent to the Division of Motor Vehicles. The defendant states its position on page 10 of its trial brief as follows:

> "* * * . As the assigning lienholder, Commonwealth Ford, Inc., was entitled to protect its own lien until the conditional sales contract was assigned to Motor Credit Corp., and thereafter its arrangement with Motor Credit Corp., obligated it to protect the security of its assignee."

Commonwealth Ford may have chosen to handle the transaction in this way, but by doing so it does not follow that it made constructive delivery of the assigned certificate of title to White prior to the accident. Commonwealth Ford's position indicates that it was holding the certificate of title for its own benefit or as agent for Motor Credit Corporation and not pursuant to constructive delivery to White.

The defendant also contends on page 34 of his trial brief:

> "The Court will also realize that, unless possession by the dealer of the documents of title under the circumstances shown in this case does constitute constructive delivery to the purchaser of the assigned title certificate in conformity with the statutes and does result in the transfer of ownership of the vehicle delivered to the purchaser, the insurance carriers of the dealers, who transact 80% of all motor vehicle sales in Virginia, will be insuring without compensation the operation of all such vehicles by all such purchasers from the day the vehicles are delivered until the Division actually issues the new certificates to those purchasers, a risk clearly not contemplated by the insurance contract."

The defendnat's argument is not supported by the record. Aside from the lack of evidence concerning insurance premiums, the evidence does not establish that other dealers in Virginia fail to deliver certificates of title to their purchasers before transmitting the certificates to the Division. Transmittal of title papers to the Division by dealers is proper. If transmittal is preceded by reassignment and actual or constructive delivery of the certificate of title to the purchaser, transfer of ownership is not dependent upon receipt of the papers by the Division or the issuance of a new title.

The defendant relies, in part, upon *General Credit, Inc.* v. *Winchester, Inc.*, 196 Va. 711, 85 S.E. 2d 201 (1955), which involved the validity of liens upon motor vehicles. That case presented issues different from those in the case at bar. The difference between the requirements for the transfer of ownership of motor vehicles and the recognition of liens is analyzed in *Janney* v. *Bell*, 111 Fed. 2d 103 (4th Cir. 1940).

Finally the defendant contends that Commonwealth Ford did not have at the time of the accident the kind of ownership necessary to grant permission to operate a motor vehicle within the meaning of the omnibus clause of the insurance policy. In Virginia, controversy over this question has been put to rest by *United States Fidelity & Guaranty Corp.* v. *Meyers Motors, Inc.*, 143 F. Supp. 96 (W.D.Va. 1956), and *Nationwide Insurance Co.* v. *Storm*, 200 Va. 526, 106 S.E. 2d 588 (1959). These cases hold that prior to the transfer of ownership of a motor vehicle in the manner prescribed by statute, the seller's liability insurance affords coverage to a buyer who is involved in an accident while operating the vehicle with the seller's permission.

The Court, therefore, concludes that the only definite act establishing constructive delivery of the reassigned certifi-

cate of title occurred on December 27. Commonwealth Ford owned the vehicle on December 24. White operated the vehicle with Commonwealth Ford's permission. The defendant is liable under the omnibus clause.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

March 29, 1963

OPINION OF CIRCUIT COURT

APPEAL FROM THE UNITED STATES DISTRIC COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
JOHN D. BUTZNER, JR., DISTRICT JUDGE

(Argued October 1, 1963. Decided April 20, 1964.)

Before HAYNSWORTH and BOREMAN, Circuit Judges, and R. DORSEY WATKINS, District Judge.

Aubrey R. Bowles, Jr., (H. Armistead Boyd, and Bowles, Boyd and Herod on brief) for Appellant, and Thomas A. Williams, Jr., (Ernest W. Williams, and Williams, Williams, Williams & Williams on brief) for Appellee.

HAYNESWORTH, Circuit Judge:

The question is whether a purchaser of an automobile from a Virginia dealer was its owner or its permissive user,

within the meaning of the dealer's liability insurance, when the old, assigned title certificate, never physically tendered to the purchaser, was in the possession of the dealer, with the approval of the purchaser, for the purpose of filing it with the Division of Motor Vehicles. The District Court held the dealer was still the owner of the vehicle and its insurer responsible for the damages caused by the automobile in the hands of the purchaser. Under the circumstances presently appearing, we think the dealer was no longer the owner.

There is no substantial dispute as to the facts. The issue is one of law.

Commonwealth Ford, an automobile dealer in Richmond, acquired a used station wagon. It received the duly assigned title certificate of the former owner, which it retained, as it was authorized to do under the provisions of § 46-1.90 of the Code of Virginia, 1950, without filing it with the Division of Motor Vehicles.

On December 20, 1961, Joseph F. White decided to purchase the station wagon from Commonwealth Ford. He traded in a used panel truck, paid $50 in cash, agreed to pay an additional $50 in cash the next day, and he executed a conditional sales contract securing the balance of the purchase price. He accepted delivery of the station wagon.

On December 20, White signed a buyer's order and a credit application, an application for title to the station wagon, a conditional sales contract and an application for a temporary registration certificate. The conditional sales contract and the application for title were signed in blank, but the application for temporary registration was completely filled out when executed by White. It contained a representation that White was the owner of the automobile. It was agreed between White and representatives of Commonwealth Ford that employees of the dealer would com-

plete the papers and deliver to the Division of Motor Vehicles those papers which were required to be filed with it. White left with Commonwealth Ford $1 with which to pay the temporary registration fee, and it was agreed that he would return at a later date to pick up the registration card.

At the time the transaction was closed, White, of course delivered to Commonwealth Ford the panel truck he was trading in on the station wagon, together with its title certificate duly assigned to Commonwealth Ford. At that time, something after 7:30 o'clock in the evening, the title certificate to the station wagon had not been reassigned by Commonwealth Ford and was not delivered to White. It was understood that the title certificate to the station wagon would be reassigned the next day when the other papers were completed and would be delivered by Commonwealth Ford, with other essential papers, to the Division of Motor Vehicles.

When the transaction on the evening of December 20 was thus concluded, White was told that the station wagon was his and he accepted delivery of it.

On December 21, the next day, employees of Commonwealth Ford completed those papers which had been executed in blank by White, and the reassignment to Wihte of the old certificate of title to the station wagon was duly executed. On that same day the conditional sales contract was delivered to Motor Credit Corporation, which immediately paid Commonwealth Ford for it. All of the other papers were submitted, or held for submission, to one of Commonwealth Ford's supervisory officials for final inspection and approval. When that occurred is not shown but the District Court found that, in the normal course of business, it would have occurred on the morning of December 22.

The Division of Motor Vehicles closed for the Christmas

holidays at noon on December 22, 1961, and did not open again until December 27. On December 27, Commonwealth Ford delivered by messenger to the Division of Motor Vehicles all of the necessary papers in the White transaction. The Division thereupon issued a new title certificate in White's name, showing the lien of Motor Credit Corporation, and issued a new temporary registration certificate.

Meanwhile, on December 24, 1961, the station wagon operated by White struck and injured the plaintiff, Wicker. Wicker's theory is that because the reassigned certificate had not been delivered to White on the 20th, Commonwealth Ford remained the owner of the station wagon, at least until December 27 when the reassigned title certificate was delivered to the Division of Motor Vehicles and the new title certificate was issued in White's name. As owner of the station wagon, Wicker reasons, Commonwealth Ford had the right to repossess it and deny White its use, so that White's possession and operation of the vehicle were permissive and not by virtue of his own right.[1]

We disagree.

Under § 46.1-90 of the Virginia Code of 1950, an automobile dealer who acquires for resale an automobile from another is not required to forward the title certificate to the Division of Motor Vehicles. When the vehicle is resold by the dealer to another person, however, the dealer "shall give notice of the transfer to the Division and shall endorse

[1] Even if there were some imperfection in White's legal title to the station wagon, it does not necessarily follow that his use of the vehicle was permissive and not as of right. If the clearly manifested intention of the parties to transfer to White the legal as well as the equitable title was for some reason ineffective it certainly does not follow as of course that the unintended owner of the retained naked legal title also unintentionally retained the right of control of the vehicle. We need not explore that question, in light of our conclusion that on the 24th White was the owner of the technical legal title as well as of the equitable title to the station wagon.

and acknowledge an assignment and warranty of title upon the certificate and deliver it to the person to whom the transfer is made." By § 46.1-89 the transferee is required to forward the assigned certificate to the Division, with applications for registration of the automobile in the name of the transferee and for a certificate of title.

It has been held by Virginia's Supreme Court of Appeals that the requirements of § 46.1-90 are mandatory, and that in some circumstances, failure to execute an assignment of the title documents prevents passage of the legal title.

The question first came up in a very different context. In Thomas v. Mullins, 153 Va. 383, 149, S.E. 494, it appeared that the plaintiff had selected an automobile from the defendant's stock. Before any instruments of transfer had been executed, however, the automobile was destroyed by fire while in the dealer's garage and in his custody. The Court held that it was an executory not an executed sale, and that the risk of loss by fire remained upon the dealer. It relied in large measure upon the provisions of § 46.1-90 and the fact that there had been no assignment of the title.

In the context of liability coverage, an affirmative agreement to postpone compliance with § 46.1-90 has been held to require a conclusion that the agreement was executory. Thus in Nationwide Insurance Company v. Storm, 200 Va. 526, 106 S.E. 2d 588, an individual, not a dealer, agreed to sell her car to another. The purchaser paid the purchase price and took possession of the vehicle, but the two agreed that they would go together on the following Monday to the Division of Motor Vehicles and there execute and file the necessary papers, including the assignment of the seller's title. On Sunday, the day before the title was to have been transferred, the purchaser of the vehicle was involved in a collision. The Court held that the seller's insurance

afforded coverage, for the agreement of sale was executory until assignment of the title certificate.

Judge Barksdale, United States District Judge for the Western District of Virginia, has placed a similar interpretation upon Virginia's statute. In United States Fidelity and Guaranty Corporation v. Myers Motors, 143 F. Supp. 96, it appeared that the dealer had delivered the automobile to the purchaser, but had not executed an assignment of the certificate when the purchaser was involved in a collision occasioning injuries. Judge Barksdale concluded that because of § 46.1-90 the sale had not been executed and the dealer's insurance afforded coverage. Judge Barksdale reached the same conclusion in a different context when the United States seized the automobile when the purchaser used it unlawfully in the liquor business. United States v. One Hudson Hornet Sedan, 110 F. Supp. 41. It was held that the dealer was entitled to remission because, not having executed the assignment of the title certificate at the time of seizure of the automobile, he was still its owner.

We accept, of course, Virginia's interpretation of its statute. In Virginia, if the assignment of the title certificate has not been executed at the time of the accident, the seller has at least a legal title and the entire transaction may be held to be executory.[2] At the same time, it is clear that if the seller delivers the title certificat eto the purchaser, the assignment on the back of the certificate having been properly executed, the seller has divested himself of all interest in the vehicle whether or not the purchaser thereafter complies with his statutory duty of filing the assigned certificate with the Division of Motor Vehicles. Nationwide

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[2] This is not necessarily the result in other jurisdictions under other statutes. See, for instance, Lynch v. United States Branch, Gen. Acc F. & L. Assur. Corp., 4 Cir., 327 F.2d 328, in which we were called upon to construe a somewhat similar South Carolina Statute.

Mutual Insurance Company v. Cole, 203 Va. 337, 124 S.E. 2d 203. Under the Virginia decisions execution of the assignment and delivery of the certificate are, or may be, critical and conclusive of the question of passage of title, but filing of the documents with the Division of Motor Vehicles is not.

Here, unlike the situations in the Mullins, Storm and Myers Motors' cases, at the time the injury was inflicted the assignment of the title had been properly and completely executed and the papers were being held only for the purpose of filing them in the Division of Motor Vehicles, then closed for the Holidays. Nothing else remained for the seller or purchaser to do.[3]

The District Court was concerned about theories of constructive delivery. It thought there could have been no constructive delivery of the title certificate on the evening of December 20 because the assignment on the back of it was not executed on behalf of Commonwealth Ford until the next day. After the 21st, it could find no definitive act which might be construed as a constructive delivery until the documents were actually filed with the Division on the 27th. This approach, however, overlooks the fact that White had clearly authorized Commonwealth Ford for him, and on his behalf, to file with the Division the assigned title certificate, his application for a new title certificate and his

[3] There was testimony that it is common practice in Virginia for automobile dealers to transmit to the Division the assigned title certificates of cars they sell. The statute places the duty of transmission upon the purchaser, but dealers regularly perform that obligation for their customers. It was the practice of Commonwealth Ford, and apparently of other dealers in Richmond, to transmit to the Division of Motor Vehicles all papers required to be filed with it by messenger rather than by mail. It is not suggested that retention of the papers during the days that the offices of the Division were closed was referable to any other circumstance than the regular custom of transmitting such papers by hand.

application for temporary registration tags. Necessarily, his authorization that Commonwealth Ford do those things for him as his agent included authorization to Commonwealth Ford to receive and hold for him the assigned title certificate until it could be filed with the Division. An agency relationship plainly existed. Commonwealth Ford was not only to file the certificate of title but White's other applications with which the dealer had no concern except the service of the convenience of its customer, and it had received from White the necessary transfer fees with which to accomplish his purposes.

It is suggested that the dealer may have wished to retain the title certificate in its possession because of its interest in protecting its lien, or that of its assignee, under the conditional sales contract. The fact that the reassignment contained a notation of the lien, as required by the statute, may appear to have been a sufficient protection of that interest, but, even if the dealer thought that assurance of proper filing of the certificate in the offices of the Division of Motor Vehicles would be of some additional protection for the lien, it does not destroy the obvious fact that, in collecting and holding these papers for filing, the dealer was acting as agent of its customer.

When the title certificate was properly reassigned on December 21, and all of the papers were complete and had been finally inspected and approved on the 22nd, the dealer was under an absolute duty which it owed to White to file them with the Division. Rightfully, it could not have retained them longer than was necessary to procure their filing. White had not paid the remaining $50 he had agreed to pay in cash, but that was clearly an open account indebtedness which had nothing to do with completion of the sale or with the filing of the several papers. When, therefore, White's agent held all of the papers, fully executed

and ready for filing, for the sole purpose of filing them, it held them as White's agent and would not have been permitted to take an inconsistent or disloyal position. The delay beyond December 22 of the actual filing of the papers was occasioned by the closing of the offices of the Division of Motor Vehicles and not by any neglect of the agent-dealer.

In Virginia even an actual delivery may be found if an intention to deliver is sufficiently manifested. In Payne v. Payne, 128 Va. 33, 104 S.E. 712, for instance, the testator executed a will in which he expressed an intention to convey certain land to his son and stated that the deed would be found with the will. Thereafter he executed a deed which was found with the will. The Court held there was a sufficient delivery of the deed, though it appears never to have left the possession of the grantor until his death. Here, the intention to deliver the certificate is certainly as clearly and unequivocally manifested as was the intention to deliver in Payne. The result here, however, is much more compelling than it was in Payne, for here when the papers were all completed, collected with similar papers arising out of other transactions and held solely for the purpose of filing them all with the Division of Motor Vehicles, the possession was that of the agent of the purchaser. Since White's agent possessed the properly reassigned certificate in that capactiy, it was delivered to White and possessed by him.

There was no doubt among the parties as to the owner of this automobile when it was being operated by White on December 24. What doubts might be derived from Virginia's statute were resolved in accordance with the intention and understanding of the parties when the seller held the properly assigned title certificate for the sole purpose of

filing it, and had an unequivocal duty, as the buyer's agent, to do that.

Since the sale of the vehicle was executed, not executory, White's use of the automobile was not permissive and the omnibus clause of the dealer's liability insurance did not extend the coverage of that insurance to White.

Reversed.

APPLICABLE STATE STATUTES

"§ 38.1-381. (a) No policy or contract of bodily injury liability insurance, or of property damage liability insurance covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this State to the owner of such vehicle, or shall be issued or delivered by any insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the named insured and any other person responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured, against liability for death or injury sustained, or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured or by any such person. * * *"

§ 46.1-87. How transferred.—The owner of a motor vehicle, trailer or semitrailer registered under the provisions of this chapter transferring or assigning his title or interest thereto shall endorse an assignment and warranty of title upon the reverse side of the certificate of title of the motor vehicle, trailer or semitrailer to the purchaser thereof, with a statement of all liens or encumbrances thereon, shall acknowledge his signature thereto before a person authorized to administer oaths and shall deliver the certificate to the

purchaser or transferee at the time of delivering the motor vehicle, trailer or semitrailer. (Code 1950, § 46-84; 1958, c. 541.)

§ 46.1-90. When transferred certificate need not be forwarded.—When the transferee of the motor vehicle, trailer or semitrailer is a dealer who holds the same for resale and operates the same only for sales purposes under a dealer's license plate or when the transferee does not drive the motor vehicle, trailer or semitrailer nor permit it to be driven upon the highways, the transferee shall not be required to register it or forward the certificate of title to the Division, as provided in § 46.1-89, but such transferee upon transferring his title or interest to another person shall give notice of the transfer to the Division and shall endorse and acknowledge an assignment and warranty of title upon the certificate and deliver it to the person to whom the transfer is made. (Code 1950, § 46-86; 1958, c. 541.)